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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARC CHRISTIAN STEIGLEDER, Defendant and Appellant.	B239656 (Los Angeles County Super. Ct. No. BA244145)

APPEAL from the denial of a petition for writ of error *coram nobis* by the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Berc Agopoglu for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Steven D. Matthews, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Marc Christian Steigleder, appeals from the trial court's denial of his petition for writ of error *coram nobis*. In 2003, Steigleder was convicted for cultivating marijuana (Health & Saf. Code, § 11358) and sentenced to probation for three years. In 2011, Steigleder filed a *coram nobis* petition seeking to vacate that judgment.

The trial court's denial of Steigleder's *coram nobis* petition is affirmed.

BACKGROUND

In April 2003, Steigleder was charged by information with cultivating marijuana in violation of Health and Safety Code section 11358. He pled not guilty and moved to suppress evidence under Penal Code section 1538.5.[1] At an evidentiary hearing on that motion, witnesses testified and various exhibits were admitted into evidence.[2] The suppression motion was denied.

Steigleder thereafter waived his right to a jury trial and agreed to submit the matter to the trial court for decision based on the evidence presented at the suppression hearing. On September 19, 2003, the trial court found Steigleder guilty and sentenced him to probation for three years. That probationary sentence has been served.

On July 13, 2011, Steigleder filed a motion "for an order vacating the judgment and permitting the defendant to withdraw the plea of guilty" to the marijuana conviction. In his attached declaration, Steigleder stated the public defender had advised him "to take a plea bargain" but had failed to advise him "about the immigration consequences of [his] plea."

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[1] All further references are to the Penal Code unless otherwise specified.

[2] A complete transcript of the Evidence Code section 402 evidentiary hearing was not made part of the record on appeal.

On August 23, 2011, Steigleder filed a petition for writ of error *coram nobis*, also seeking to vacate the marijuana conviction. In his attached declaration, Steigleder again stated he had not been advised of the immigration consequences. He added an assertion that the public defender had rendered ineffective assistance by failing to properly defend him against the marijuana charge.[3]

On December 16, 2011, the trial court denied both the motion to vacate judgment and the *coram nobis* petition. Steigleder thereupon filed a notice of appeal limited to the denial of his *coram nobis* petition.

CONTENTION

The trial court erred when it denied Steigleder's *coram nobis* petition.

DISCUSSION

1. *Legal principles.*

"The seminal case setting forth the modern requirements for obtaining a writ of error *coram nobis* is *People v. Shipman* (1965) 62 Cal.2d 226 . . . . There we stated: 'The writ of [error] *coram nobis* is granted only when three requirements are met. (1) Petitioner must "show that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." [Citations.] (2) Petitioner must also show that the "newly discovered evidence . . . [does not go] to the merits of issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial." [Citations.] This second requirement applies even though the evidence in question is not discovered until after the time for moving for a new trial has elapsed or the motion has been denied. [Citations.] (3) Petitioner "must show that the facts upon which

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[3] The non-declaration portion of the *coram nobis* petition contains additional claims neither made in nor supported by Steigleder's declaration, for instance that he was unaware "his attorney was putting him on the stand which made him confess to the crime."

he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ. . . .' ' [Citation.] These factors set forth in *Shipman* continue to outline the modern limits of the writ." (*People v. Kim* (2009) 45 Cal.4th 1078, 1092-1093.)

"[A] lower court's ruling on a petition for the writ [of *coram nobis*] is reviewed under the abuse of discretion standard." (*People v. Kim, supra,* 45 Cal.4th at p. 1095.)

2. *Procedural background.*

The declaration attached to Steigleder's motion to vacate the judgment claims he told the public defender he was innocent, but she advised it would be in his best interests to take a plea bargain. He states nobody advised him of the immigration consequences of pleading guilty and, had he been properly informed, he would have asked for a jury trial. Steigleder adds: "I am making this motion, because I recently hired Mr. Berc Agopoglu to investigate my file. Mr. Agopoglu advised me that none of the records reflect that I was properly warned or advised about the immigration consequences."

In the declaration attached to his *coram nobis* petition, Steigleder again states he was never advised of the immigration consequences of waiving a jury trial, and then adds: "What's more important my public defender . . . never defended me in [the] judge trial with respect to the elements of the crime. [My public defender] argued for 'personal use' which was not a defense to my case and [the] prosecutor made this very clear and with this representation I was immediately convicted. Had I known about this professional error, I would have hired another attorney to represent me."

At the December 16, 2011, hearing on Steigleder's motion and writ, the prosecutor urged the trial court to deny relief, arguing an advisement regarding immigration consequences was unnecessary because Steigleder had gone to trial: "I don't see that as being an issue here. This was not a case where a plea was

received but rather there was a court trial and specifically a finding of guilty by the court and a specification in the record that this wasn't a plea but rather a finding that the court made based on evidence that was adduced at the court trial."

The prosecutor then said: "The other issue concerns this claim that the defendant was eligible at the time for what's described as the affirmative defense of medical use under 11362.5 of the Health and Safety Code and the claim that the lawyer who represented the defendant at the time never argued for that." After noting the absence in the record of a complete transcript of the earlier proceedings, the prosecutor argued: "[T]he court . . . knows from the preliminary hearing transcript that there was testimony from an expert that . . . the marijuana in this case was possessed not just for personal use but also for sales . . . ."

The trial court responded to the prosecutor: "Counsel, I think those two issues are valid issues. And the other issue I noted was the timeliness. This case was tried nine years ago, eight and a half years ago. [¶] And Mr. Steigleder later attempted several times over the course of the years through different procedural mechanisms to get this matter set aside. So why did we [*sic*] wait so long?

"Mr. Agopoglu: Your Honor, as I explained in my motion, that my client didn't know about this problem in the case.

"The Court: You mean, he didn't know that the immigration authorities were going to come after him; right?

"Mr. Agopoglu: The case is not – it's about affirmative defenses, Your Honor.

"The Court: Wait a second. . . . [T]here's no allegation anywhere in here that he had anything that even vaguely resembled proof that would support a medical marijuana claim, . . . no allegation that he had a medical marijuana card. There's no evidence that he had a recommendation from a physician for the use of marijuana. Nothing that I've seen.

"Mr. Agopoglu: I have the full transcript –

"The Court: You did not lodge that, counsel, and it's not part of the court's record. . . . [T]he record that you lodged with the court does not contain any of that.

"Mr. Agopoglu: Your Honor, if the court wants the transcript, the medical marijuana card was introduced. And actually evidence was presented for medical use but it was never argued as an affirmative defense. The transcript is here. And if the court wants to review it, we can present it to the court.

". . . . . .

". . . . . .

"The Court: Well, if Mr. Steigleder gave the medical marijuana card information to his counsel, how can he come back eight years later and say he was not aware of the fact that that was an affirmative defense?

"Mr. Agopoglu: Your Honor, I mean –

"The Court: Answer my question. How can he give that information to his attorney? Obviously . . . assuming he got a medical marijuana card. And, again, there's no evidence before me at this point. But assuming he got a medical marijuana card. He got it in order to be able to possess marijuana for medicinal purposes legally; and if he did that, how can he come back and say that he didn't know it was a defense eight years later?

"Mr. Agopoglu: Because, Your Honor, he's a laymen [*sic*] . . . ."

The trial court then announced its ruling: "[F]irst of all, I'm not going to reach the merits of this. Mr. Steigleder clearly knew that possession of a medical marijuana card could be an affirmative defense, and that's the only logical reason. And even assuming he had one – and, again, there's no evidence before the court. But taking you at your word that he had one, to have waited eight and a half years to bring this before the court renders it untimely. And the petition is denied as being untimely."

3. *Discussion.*

We conclude, for the following reasons, that the trial court did not abuse its discretion by denying Steigleder's petition for writ of error *coram nobis*.

a. *Steigleder has not presented an adequate record on appeal.*

The Attorney General argues Steigleder failed to present an adequate record on appeal. We agree.

Steigleder waived a jury and submitted to a court trial based on the testimony and physical evidence produced at the hearing on his motion to suppress evidence. However, although it is clear a reporter's transcript of this suppression hearing was prepared, Steigleder has included in the record before us only a small portion of that transcript.[4] Even if the post-trial judge saw fit to rule on the *coram nobis* petition without benefit of the entire transcript, Steigleder should have provided this court with the complete transcript, particularly given the reference in the included portion to expert testimony showing the marijuana had been possessed for sale.

"It is axiomatic that it is the burden of the appellant to provide an adequate record to permit review of a claimed error, and failure to do so may be deemed a waiver of the issue on appeal." (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385; see, e.g., *People v. Siegenthaler* (1972) 7 Cal.3d 465, 469 [on challenge to denial of motion to set aside information, defendant who "failed to include as part of the record on appeal the transcript of the preliminary hearing, defendant is now precluded from seeking appellate review of the denial of the motion"]; *People v. Scott* (1944) 24 Cal.2d 774, 777 ["After reading the transcript of the preliminary examination, the court denied the motion. This transcript was not brought up on appeal, and error cannot be assumed in its absence."].)

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[4] Attached to the *coram nobis* petition are pages 91 through 98 of a longer reporter's transcript.

Expert testimony that the marijuana was possessed for sale may have completely undermined Steigleder's alleged medical marijuana defense. Minute orders indicate Steigleder testified at the suppression hearing and that the defense introduced into evidence a "prescription." We cannot, however, tell exactly what went on because the record on appeal is incomplete.

Steigleder has failed to present an adequate record on appeal.

b. *Steigleder's coram nobis petition was untimely.*

Steigleder contends the trial court erred by declaring his *coram nobis* petition untimely. This claim is meritless.

The Attorney General argues: "Appellant based his motion and petition on a claim that he had an available affirmative defense to the charge – medical use pursuant to Health and Safety Code section 11362.5 [the Compassionate Use Act of 1996] – and that he was not advised of the immigration consequences when he submitted on the transcript of the Evidence Code section 402 hearing. However, appellant filed his motion and petition in 2011, nearly eight years after he was found guilty upon the transcript, and yet he did not append a declaration affirming when he learned of this allegedly available defense, when he learned of the immigration consequences, and why he waited eight years before seeking relief. Appellant was required to allege in his petition with specificity when he learned of the facts forming the basis for the requested relief."

Steigleder's *coram nobis* petition asserted: "No appeal was taken from the judgment, the time for appeal has passed, and Petitioner has no other adequate remedy available except this petition for writ of *coram nobis*." But he has failed to explain the trial court's statement that Steigleder "later attempted several times over the course of the years through different procedural mechanisms to get this matter set aside." The only explanation offered by Steigleder himself is that he "recently hired Mr. Berc Agopoglu to investigate my file." According to Steigleder's opening brief, this occurred "on or about May of 2011." Unexplained is what happened between Steigleder's 2003 conviction, for which he was sentenced to

three months probation, and the filing of his *coram nobis* petition in 2011. "It is well settled that a showing of diligence is prerequisite to the availability of relief by motion for *coram nobis*. [Citations.]" (*People v. Shorts* (1948) 32 Cal.2d 502, 512-513; see *People v. Kim, supra,* 45 Cal.4th at p. 1098 [*coram nobis* petition procedurally barred because filed seven years after INS initiated deportation proceedings, and defendant "fail[ed] to allege with specificity when he learned the facts forming the basis of his petition"]; *People v. Trantow* (1986) 178 Cal.App.3d 842, 847 [filing *coram nobis* petition eight years after filing habeas petition, and 14 years after conviction, constitutes inexcusable delay].)

Under the circumstances of this case, we cannot say the trial court abused its discretion in determining Steigleder's *coram nobis* petition was untimely.

c. *The petition fails on the merits.*

Finally, to quote from *People v. Kim, supra,* 45 Cal.4th 1078: "Even were we to overlook the procedural flaws in defendant's application for a writ of error *coram nobis*, we would conclude he has not demonstrated that facts existed at the time of his plea that satisfy the strict requirements for this extraordinary type of collateral relief from a final judgment. Specifically, he has not shown ' "that some fact existed which, without any fault or negligence on his part, was not presented to the court at the trial on the merits, and which if presented would have prevented the rendition of the judgment." ' [Citation.]" (*Id.* at pp. 1101-1102.) "[F]acts that have justified issuance of the writ in the past have included a litigant's insanity or minority, that the litigant had never been properly served, and that a defendant's plea was procured through extrinsic fraud or mob violence. [Citation.] Defendant's alleged new facts, in contrast, speak merely to the *legal effect* of his guilty plea and thus are not grounds for relief on *coram nobis*." (*Id.* at p. 1102.)

Steigleder's claim, that he would have pursued another trial strategy had he been informed of the immigration consequences of his situation, is not the proper basis for *coram nobis* relief. In *Kim* our Supreme Court concluded defendant's assertions, that he would not have pled guilty had he known the convictions

constituted crimes of moral turpitude in the eyes of the INS, "speak merely to the *legal effect* of his guilty plea and thus are not grounds for relief on *coram nobis*." (*People v. Kim, supra,* 45 Cal.4th at p. 1102; accord, *People v. Ibanez* (1999) 76 Cal.App.4th 537, 544-545 [whether defendant must be advised of potential civil commitment under Sexually Violent Predators Act before pleading guilty was legal, not factual, issue and therefore inappropriate for *coram nobis* relief]; *People v. Trantow*, *supra*, 178 Cal.App.3d at p. 845 [defendant's not knowing her alien status might result in deportation did not support *coram nobis* relief because it would not have prevented the judgment].)

Steigleder's claims that the public defender rendered ineffective assistance at trial, for instance by asserting a "personal use" rather than a "medical marijuana authorization" defense, are not cognizable in *coram nobis*. "That a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule. [Citations.]" (*People v. Kim*, *supra,* 45 Cal.4th at p. 1104.)

Finally, as to Steigleder's claim the trial court erred by not giving him the statutory advisement about immigration consequences, section 1016.5 does not apply in this case because Steigleder did not plead guilty, he went to trial. (See *People v. Limones* (1991) 233 Cal.App.3d 338, 345 [statutory immigration consequences advisement does not apply to slow plea dispositions: "[S]ection 1016.5 expressly refers to those situations in which a defendant enters either a plea of guilty or a plea of nolo contendere. The section does not include language or refer to those situations in which the cause, as here, is submitted to the trial court under circumstances *tantamount* to a guilty plea."].)

The trial court did not abuse its discretion by denying Steigleder's *coram nobis* petition.

DISPOSITION

The trial court's denial of the *coram nobis* petition is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.